United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

Docket No. 77-7116

In The

United States Court of Appeals

For the Second Circuit

B

P/S

DIVISION 580, AMALGAMATED TRANSIT UNION, AFL - CIO,

Appellant,

— *vs.* —

CENTRAL NEW YORK REGIONAL TRANSPORTATION AUTHORITY, 508 Midtown Plaza, Syracuse, New York, *et al.*,

Appellees.

On Appeal of An Interlocutory Order Denying Injunction From the Federal District Court, Northern District of New York

UNITED STATES COURT OF APPEALS
FILED
APR 28 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPELLANT'S REPLY BRIEF

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Syracuse, New York

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APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

This is a Reply Brief submitted by Appellant, Division 580, Amalgamated Transit Union, AFL-CIO ["Union"] in response to the Brief of Appellees, Central New York Regional Transportation Authority, et al ["Authority"].

ARGUMENT

POINT I

ARBITRATION MUST BE ORDERED SINCE THE AUTHORITY AND UNION ARE PARTIES TO AN AGREEMENT TO ARBITRATE THE INSTANT DISPUTE

On March 11, 1975, the Union and Authority entered into an agreement to arbitrate all of their disputes, including disputes over the terms to be included in a new collective bargaining agreement [A 46-57].* That agreement, known as a 13(c) Agreement and containing no expiration date, is still binding on the parties. Thus, the instant dispute must be ordered to arbitration [United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 46 LRRM 2416 (1960); see, Appellant's Brief, pgs. 21 et. seq.].

The Authority, however, seeks to avoid arbitration by variously claiming that this dispute is excluded from arbitration

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* References in this form are to the pages of the Appendix.

[B 32, 34]* and/or that it would be "ridiculous" to assume that the Authority would enter into an agreement to arbitrate this dispute [B 30].**

It is demonstrated hereinafter that: (A) The 13(c) Agreement contains no language excluding this dispute from arbitration; and (B) Ridiculous or not, the Authority did agree to arbitrate the instant dispute.

A. The 13(c) Agreement Contains No Language Excluding This Dispute From Arbitration

Language excluding a dispute from arbitration must be clear, unambiguous or unmistakeably clear; doubts must be resolved in favor of arbitration. [Machinists v. General Electric Co., 406 F.2d 1046, 1048, 70 LRRM 2477, 2478 (2d Cir. 1969)]. In the instant case, there exists no exclusionary language whatever.

The Authority claims, however, that the 13(c) Agreement restricts arbitration to disputes over "the protection of employees affected by the Project," i.e., that all other disputes are excluded from arbitration. [B 32,34]. A review of the arbitration clause demonstrates that that phrase is not an exclusionary

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* References in this form are to the pages of Appellee's Brief.

** The Authority also claims that the 13(c) Agreement expired and/or was superceded by a National Agreement [B 42]. Those arguments are addressed in Appellant's Brief, at pgs. 40-41 and 41-42, respectively.

clause; rather, it is a designation of one of the many controversies subject to arbitration.

Section 9 of the 13(c) Agreement provides in relevant part that:

> In the case of any labor dispute where collective bargaining does not result in agreement, the same may be submitted at the written request of either party to a board of arbitration . . . [A 49].

That section then admonishes that the term "labor dispute" is to be "broadly construed." It then advises that "labor dispute" includes "any controversy concerning":

> [1.] wages, salaries, working conditions or benefits . . .
>
> [2.] the making or maintenance of collective bargaining agreements,
>
> [3.] the terms to be included in such agreements,
>
> [4.] the interpretation or application of such agreements,
>
> [5.] the adjustment of grievances, any claim, difference
>
> [6.] or controversy arising out of or by virtue of any of the provisions of this agreement for the protection of employees affected by this Project. [A 50; emphasis added].

It is clear, therefore, that, rather than an exclusionary clause, the phrase "protection of employees affected by the Project" is one of the many categories of arbitrable controversies.

Finally, it is observed that the instant dispute is one within the meaning of that phrase, i.e., it arises "out of or by

virtue of . . . the provisions of this agreement [the 13(c) Agreement] for the protection of employees affected by the Project." The controversy concerns "the making . . . of [a] collective bargaining agreement[ ]" and "the terms to be included in the said agreement[ ]."

It is submitted, therefore, that this dispute must be submitted to arbitration.

B. Ridiculous Or Not, The Authority Did Agree To Arbitrate The Instant Dispute

The Authority's claim that it would be "ridiculous" for it to agree to arbitrate the instant dispute is clearly irrelevant. What is relevant is that the Authority did enter into the 13(c) Agreement, which clearly provides for arbitration of the instant dispute.

In any event, it is submitted that it is not at all ridiculous for the Authority to have entered into the 13(c) Agreement. The Authority was obligated to enter into such an arrangement if it wished to obtain federal monies under Section 3 of the Urban Mass Transportation Act ["Act"] [Section 13(c) of the Act].

It is submitted, therefore, that since the Authority and the Union are parties to an Agreement to arbitrate the instant dispute, arbitration must be ordered.

POINT II

WHETHER THE UNION'S PAST COLLECTIVE BARGAINING AGREEMENTS CONTAINED ARBITRATION CLAUSES IS IRRELEVANT.

The Authority asserts that arbitration cannot be ordered herein because the Union's past collective bargaining agreements allegedly did not contain arbitration clauses. [B 35-50]. That argument is irrelevant because the 13(c) Agreement clearly provides for arbitration; and because, as discussed below, Section 13(c) of the Act does not limit protective arrangements to the preservation of rights contained in past collective bargaining agreements.

Section 13(c) of the Act sets forth a comprehensive plan for the protection of mass transit employees in the face of public takeovers. That plan includes, but is specifically not limited to, continuation of rights contained in past collective bargaining agreements. Among other things, the Act protects past "collective bargaining rights." In the instant case one of those rights was to enter into interest arbitration agreements. [See, Local 92 v. News-Free Press Co., 524 F.2d 1305, 90 LRRM 3000 (6th Cir. 1975); Local 50 v. Newspaper Printing Corp., 399 F.Supp. 593, 88 LRRM 2219 (E.D. Tenn. 1974), aff'd, 518 F.2d 351, 89 LRRM 2861 (6th Cir. 1975)].

It is clear, therefore, that whether the Union's past collective bargaining agreement contained an interest arbitration provision is not relevant.

It is noted that another of the rights the Union possessed was the right to strike [See, N.L.R.B. v. Baltimore Transit Co., 140 F.2d 51, 13 LRRM 739 (4th Cir. 1944)]. Public employees in New York State, however, are prohibited from striking [New York Civil Service Law §210].

Thus, in order to protect the employees' collective bargaining rights, the parties agreed to replace the right to strike with the interest arbitration provisions contained in the 13(c) Agreement. Only in that manner, or by amendment to the New York Civil Service Law, could the Authority qualify for federal assistance under Section 3 of the Act. [See, Senator Morse's remarks at 88 Cong. Rec. 5672, 5684 (1963), to the effect that federal monies under the Act would not be available to public employers where their employees' collective bargaining rights were limited].

It is submitted, therefore, that the alleged absence of interest arbitration clauses in the Union's past collective bargaining agreements cannot bar arbitration herein.

POINT III

IT IS CONTRARY TO FEDERAL LAW TO HOLD THAT THE UNION WAIVED ARBITRATION HEREIN

The Authority maintains that by participation in mediation, the Union waived its right to arbitration [B 53 et. seq.].* The error in this argument is explained in Appellant's Brief, pgs. 20-29, 43 and 50-51.

It is also noted, however, that rights afforded as a matter of public policy cannot be waived. Thus, in Joseph Denunzio Fruit Co. v. Crane, 79 F.Supp. 117 (D.C. Conn. 1948), it was observed that:

> It is apparently universally held that where a right has been given to an individual not alone for his private benefit but, as a matter of public policy, in the interest of the state, it may not be waived by anyone. Glendale v. Coquat, 52 F.2d 1178, 1180 (Ariz., 1935).

[See, also, Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945); Watkins v. Hudson Coal Co., 151 F.2d 311 (3rd Cir. 1945); Wilkinson v. Noland Co., 40 F.Supp. 1009, 1013 (D.C. Va. 1941)].

In the instant case, the rights afforded by Section 13(c) of the Act, concerning, among other things, the preservation of collective bargaining rights, are afforded as a matter of public

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* The Authority also asserts that all previous negotiations between the parties were "resolved under the Taylor Law." [B 28]. This assertion is irrelevant and misleading. In fact, the parties' previous negotiations were resolved voluntarily, i.e., by mutual agreement. At no time has a legislative resolution of a dispute been imposed on the Union.

policy. As Senator Morse observed, in connection with Section 13(c) of the Act:

> In my judgment, we cannot justify, as a matter of public policy, the use of Federal dollars by a local community or a governmental unit thereof to be spent for development of a transit system, the expenditure of which would result in worsening the present collective bargaining rights of free labor which operates that transit system. [88 Cong. Rec. 5671 (1963)].

It is submitted, therefore, that since the rights under Section 13(c) of the Act are afforded as a matter of public policy, those rights cannot be waived.

POINT IV

THIS APPEAL IS NOT MOOT

The Authority claims that this Appeal is moot because the parties have participated in factfinding. [B 63 et. seq.] It is submitted that the instant appeal is not moot because: (A) Factfinding, which the Union seeks to enjoin, has not yet been completed; (B) The Authority is still threatening to unilaterally impose a resolution of this dispute upon the Union, allegedly pursuant to New York Civil Service Law §209; (C) The Union's right to arbitrate the instant dispute has not yet been judicially confirmed; and (D) By the nature of the relationship between the parties, the instant dispute is one that will recur.

A. Factfinding Has Not Yet Been Completed

The Union has continuously sought, among other things, to stay factfinding for reasons explained in Appellant's Brief. As a result of the Order of the Honorable Lloyd F. MacMahon, United States District Judge, the Union has been forced to participate in factfinding.* However, as all parties agree, factfinding has

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* The Authority's assertion that: "Judge MacMahon stated at A-232 that he does not see any urgency from the conduct of the Union . . . in not moving forward expeditiously under his Order [ordering factfinding]" [B 25], is not borne out by the record. The "urgency" the District Court referred to was the Authority's claimed need to an expeditious hearing to vacate the temporary restraining order, enjoining, inter alia, factfinding.

Judge MacMahon, on the motions for summary judgment, stated, [A 232-33], that:

> Since everything [factfinding] can be put off until March, I don't see a great urgency. But what was represented to the Court to be an urgent situation that this thing go forward tomorrow [the Authority's motion to vacate the T.R.O.], and on the basis of that, I ran over from Utica and held a hearing to determine whether this temporary restraining order should remain in full force . . . .

The party who represented to the District Court that the situation was urgent and had to go forward "tomorrow", was the Authority. Judge MacMahon, in his decision on the preliminary injunction application, made that clear. He stated, [A-8], that:

> The Court, as Judge MacMahon is sitting by designation in Utica at the time of this application on February 7, I was sitting in a trial which fortunately settled yesterday afternoon, and enabling me following some telephone calls to my secretary by Mr. Shulman [the Authority's counsel] and his urgent request that this matter be heard on a Motion to Vacate it at once.

not yet been completed. Thus, this Appeal is not moot. This Court can and should enjoin the said factfinding.

B. The Authority Is Still Threatening To Unilaterally Impose A Resolution Of This Dispute Upon The Union

In this action, the Union seeks to enjoin, in addition to factfinding, the Authority's unilateral imposition of a resolution of this dispute. [A 3, 24, 27, 29 et. seq.]. Since the Authority has not yet imposed such a resultion on the Union, this Court can still issue an order enjoining the Authority from imposing such a resolution. Thus, the case is not moot.

The Authority's imposition of a resolution, in lieu of arbitration, will, of course, irreparably harm the Union. In Republic Aviation Corp. v. Republic Lodge No. 1987, 169 N.Y.S.2d 651, 667, 41 LRRM 2298, 2305 (Sup.Ct. Queens Co., 1957), the court observed that:

> An injury is irreparable when it cannot be adequately compensated in damages, or there is no certain pecuniary standard for the measurement of damages.

The Union's injury herein, if the Authority is not enjoined, would be the loss of: its previously held collective bargaining rights; its right to arbitration; and the governing of its relations with the Authority by a collective bargaining agreement less favorable than would be obtained by arbitration. Such injury cannot be adequately compensated in damages nor is there a pecuniary standard for the measurement of the damages, i.e., the injury would be irreparable.

Finally, it cannot be doubted that the Authority will impose such a resolution on the Union at the conclusion of factfinding. Section 209 of the New York Civil Service Law provides for such a resolution. And, the Authority has and continues to take the position that it will impose a resolution of the dispute on the Union at the conclusion of factfinding.*

This Appeal is not moot, therefore, since an injunction can still issue, as prayed for, to enjoin the Authority from unilaterally imposing a resolution of this dispute on the Union.

C. The Union's Right To Arbitrate The Instant Dispute Has Not Yet Been Judicially Confirmed

This Appeal concerns, among other things, the failure of the District Court to immediately order the entire dispute to arbitration. Since the dispute between the parties is unresolved and since the Union's right to arbitration herein has not yet been judicially confirmed, this Appeal is not moot.

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* It is noted that the Authority erroneously argues, on one hand, that the Union made its application for an injunction on the eve of factfinding [See, Affidavit attached to the Authority's motion to dismiss Appeal, at ¶"Sixth"; on the other hand, the Authority asserts that the Appeal should be dismissed because sufficient time exists for another application to enjoin an imposed resolution of the dispute, presumably on the eve of such imposition [See, Affidavit attached to the Authority's motion to dismiss Appeal, at ¶"Twenty-fourth"].

D. By The Nature of the Relationship Between The Parties, The Instant Dispute Is One That Will Recur

The Union and the Authority are involved in a continuing relationship governing, among other things, the terms and conditions of employment of the member-employees. Regardless of the resolution of the instant dispute, the parties will be involved in numerous other disputes over the terms and conditions of employment. Those disputes will include, among others, disputes over the terms to be incorporated into a new collective bargaining agreement, identical to the instant dispute.

The Authority has and continues to take the position that the agreement to arbitrate contained in the 13(c) Agreement does not bind them to arbitrate the instant dispute. Since disputes of this nature will arise in the future, this case is not moot [Cf., Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 85 LRRM 2913 (1974)].

POINT V

SOVEREIGN IMMUNITY IS NOT A BAR TO THIS SUIT

Sovereign immunity is not a bar to this suit because: (A) This is an action for declaratory and injunctive relief; (B) The Authority does not constitute the State; (C) The Authority has waived immunity from suit, and (D) The directors, officers and employees of the Authority, sued herein in their representative capacities, are not immune from suit, since they are acting in

violation of the federal rights of the Union and its members.

A. This Is An Action For Declaratory And Injunctive Relief

An action to direct state officials to bring their conduct into conformity with federal law is not barred by the Eleventh Amendment to the U.S. Constitution, i.e. sovereign immunity. [Rothstein v. Wyman, 467 F.2d 226, 236 (2d Cir. 1972); Ex Parte Young, 209 U.S. 123 (1908)]. This is so because such an action, injunctive in nature, does not impinge upon the treasuries of the states. [Rothstein v. Wyman, supra at 237; see also, Sostre v. McGinnis, 442 F.2d 178, 204-205 (1971), cert. denied, sub nomine, Sostre v. Oswald, 404 U.S. 1049, 92 S.Ct. 719 (1972)].

In the instant case, the Authority, and its directors, officers and employees, state officials sued in their official capacities, are sued to bring their conduct into conformity with federal law, to wit: Section 13(c) of the Urban Mass Transportation Act of 1964, as amended [49 U.S.C. §1609(c)]; Section 1 of the Civil Rights Act of 1871 [42 U.S.C. §1983]; the Fourteenth Amendment to the U.S. Constitution; and Article 1, Section 10, Clause 1 of the U.S. Constitution.*

Thus, it is clear that sovereign immunity is not a bar to this suit.

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* For a full explanation of the Authority's violations of those federal laws, see Appellant's Brief, especially at pgs. 9-20.

B. The Authority Does Not Constitute The State

The Eleventh Amendment does not provide immunity for governmental entities lesser than the state itself. [See, Markham v. City of Newport News, 292 F.2d 711, 716 (4th Cir. 1961); Baton Rouge Contracting Company, Inc. v. West Hatchie Drainage District of Tippah County, Mississippi, 279 F.Supp. 430, 431 (N.D. Miss. 1968); C. Wright, Law of Federal Courts 197-198 (3rd Ed. 1976)].

The Authority herein is not the State of New York; rather, it is a lesser governmental entity and is, therefore, not provided with immunity from suit under the Eleventh Amendment. [See, also, Matherson v. The Long Island State Park Commission, 442 F.2d 566, 568 (2d Cir. 1971); Zeidner v. Wulforst, 197 F.Supp. 23 (E.D.N.Y. 1961)].*

C. The Authority Has Waived Immunity From Suit

The Authority has waived immunity from suit by accepting federal funds under the Urban Mass Transportation Act of 1964,

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* It is noted that the alter ego theory, i.e., that the Authority is the alter ego of the state, is inapplicable herein. It is only the Authority and/or its directors, officers and employees that the Union seeks to enjoin herein, and only in respects peculiar to the Authority, i.e., in regard to its labor relations. The Authority is vested with power, independent from the state, to conduct its labor relations [Public Authorities Law §1331(A)(14); Civil Service Law §204, 209(2)].

In any event, even if this action were one for money damages, it is observed that the State of New York has no obligation to pay any judgments obtained against the Authority.

and by engaging in a proprietary, as opposed to governmental, enterprise. Additionally, the Authority has waived immunity from suit by specific statutory authorization, to wit, Section 1331 of the New York Public Authorities Law.

The Authority herein has accepted federal monies under Section 3 of the Urban Mass Transportation Act of 1964 [49 U.S.C. §1602]. In doing so, it became bound by all of the obligations set forth in that Act, including the obligations set forth in Section 13(c). As Senator Morse observed in the debates over Section 13(c) of the Act:

> The State can continue its State policy if it wishes to; but in the judgment of the Senior Senator from Oregon, the State should not be allowed to receive Federal money with which to continue a policy that is in conflict with sound Federal policy [i.e., federal labor policy guaranteeing collective bargaining rights]. [88 Cong. Rec. 5672 (1963)].
>
> I want to be very frank as I say this today: In rare cases in which local law prohibits collective bargaining, Federal money would not be available, because it would be in conflict with the policy of the bill. [88 Cong. Rec. 5684 (1963)].

Thus, it is submitted that by accepting those monies, the Authority waived what immunity it may have had and, thereby, consented to the enforcement of its obligations under the Act in federal courts. [Cf., Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 144 (1947)].*

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* It is noted that the instant case is distinguishable from National League of Cities v. Usery, 426 U.S. 833, 49 L.Ed.2d 245 (1976) in that the grant of federal aid to the Authority under Section 3 of the Urban Mass Transportation Act is specifically conditioned upon compliance with Section 13(c) of the said Act.

Additionally by engaging in a proprietary function, to wit, the operation of a mass transporation system, the Authority has clearly waived what immunity it may have had. Thus, in United States v. California, 297 U.S. 175, 182 (1936), the Court held that California's operation of a railroad engaged in "common carriage by rail in interstate commerce" obligated it to comply with federal standards. Furthermore, the violation of those standards was found to be redressable in the federal courts. [See, also, Parden v. Terminal R. Co., 377 U.S. 184 (1964); California v. Taylor, 353 U.S. 553 (1957); ILA v. State Ports Authority, 511 F.2d 1007, 88 LRRM 2863 (4th Cir. 1975)].

It is relevant to note, in this regard, that the Authority's reliance on National League of Cities v. Usery, supra, 426 U.S. 833, 854, 49 L.Ed.2d 245, n. 18 (1976) is misplaced [B 45 et. seq.]. There, the Court specifically indicated that its decision did not overrule Parden v. Terminal R. Co., supra, and California v. Taylor, supra.*

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* The Authority's reliance on the New York Supreme Court decision in Staten Island Rapid Transit Operating Authority v. International Brotherhood of Electrical Workers, Local 922, Index No. 878/77 (Sup.Ct. Monroe Co., February 28, 1977) [B 48 et. seq.], is similarly misplaced because that case, it is submitted, is erroneous. That case relies upon National League of Cities v. Usery, supra. But, as observed, that decision did not overrule Parden, supra, and Taylor, supra, which would have upheld the right to strike denied by the New York Supreme Court.

Additionally, the Staten Island case is irrelevant because there exists no emergency herein, which emergency the Staten Island court apparently found controlling. That case is also irrelevant because this case does not concern the right to strike [see, infra, at pg. 22], and because the Authority, by accepting the federal monies herein, agreed to be bound by the federal standards [Section 13(c) of the Act].

Finally, Section 1331(A)(1) of the New York Public Authorities Law, specifically authorizes the Authority: "To sue and be sued." Thus, the Authority has, by state statute, waived what immunity it may have possessed.

D. The Directors, Officers, And Employees Of The Authority Are Not Immune From Suit

As discussed supra, at pages 56, the directors, officers and employees of the Authority are sued herein to bring their conduct into conformity with federal law, to wit: 49 U.S.C. §1609(c); 42 U.S.C. §1983; the Fourteenth Amendment to the U.S. Constitution; and Article 1, Section 10, Clause 1 of the U.S. Constitution. Thus, they are not immune from suit herein. [See, Rothstein v. Wyman, supra; Ex Parte Young, supra].

POINT VI

ABSTENTION WOULD BE INAPPROPRIATE HEREIN

The Authority, apparently, claims that the District Court should have abstained from deciding this case [B 47 et. seq.].* As discussed hereinafter, this is not a case in which abstention is proper. Thus, the District Court did not commit error nor abuse its discretion by not abstaining herein.

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* Although the Authority does not mention the abstention doctrine, the Authority's citation and discussion of Staten Island Rapid Transit Operating Authority v. International Brotherhood of Electrical Workers, Local 922, Civil No. ___ (E.D.N.Y. February 4, 1977) apparently raises the issue.

There are only three circumstances when abstention may be appropriate, to wit: (1) to avoid decision of federal constitutional issues where the case may be disposed of on questions of state law--the Pullman Doctrine*; (2) to avoid needless conflict with a state's administration of its own affairs--Burford-type abstention**; and (3) to leave unsettled questions of state law to the states--Thibodaux abstention.***

This case does not present any of the circumstances where abstention is appropriate. It is not appropriate to abstain under: (A) The Pullman Doctrine, because the case, insofar as it arises under the Act, does not pose constitutional issues to be avoided and because there are no unsettled questions of state law that might be determinative; (B) The Burford Doctrine, because there is no available state administrative procedure to remedy the violation of the Union's federal rights; nor (C) The Thibodaux Doctrine, since there are no unsettled questions of state law at issue.

A. Pullman Abstention Would Not Be Appropriate Herein

The Pullman Doctrine is based on the premise that premature adjudication of constitutional issues should be avoided. Thus,

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* Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643 (1941).

** Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098 (1943).

*** Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 79 S.Ct. 1070 (1959).

the courts will abstain where adjudication of unsettled state law issues may avoid the constitutional issue. [Railroad Commission of Texas v. Pullman, supra, at 500, 61 S.Ct. at 645].

In the instant case, abstention is inappropriate because the Union's claim under Section 13(c) of the Act presents no constitutional issue to be avoided and because there are no unsettled state law issues whose decision could avoid a constitutional adjudication, if one were necessary.

The Union's claim, arising under Section 13(c) of the Act, is that the Authority is violating the Act, as well as the 13(c) Agreement, by refusing to arbitrate the instant dispute. Thus, no constitutional adjudication is necessary to decide the Union's claim.

Additionally, there exists no unsettled state law issues whose determination could avoid a constitutional adjudication. Pursuant to the decisions of the highest courts of the State of New York, the instant dispute must be ordered to arbitration. [See, Appellant's Brief, at pgs. 45 et. seq., and cases cited therein].

It is submitted, therefore, that abstention under the Pullman Doctrine is not appropriate herein.

B. Burford Abstention Would Not Be Appropriate Herein

Burford abstention relies upon the availability of state court review of administrative orders for the protection of federal rights. Where such review is available, the federal

District Courts may, in their sound discretion, abstain. [Burford v. Sun Oil Co., supra, at 318, 334; Alabama Public Service Comm. v. Southern R. Co., 341 U.S. 341, 349, 71 S.Ct. 762, 768 (1951)].

In the instant case, there exists no state court review of the threatened administrative action that can protect the Union's federal rights. Thus, Burford abstention is inappropriate herein.

Pursuant to New York Civil Service Law §209(3)(e)(iv), the Authority will, at the conclusion of factfinding, unilaterally impose a resolution of the instant dispute upon the Union. The Authority will impose such a resolution in violation of the parties' agreement to arbitrate the dispute.

The Authority, however, claims that, after it imposes the resolution, the Union's rights would be protected by court review pursuant to Article 78 of the New York Civil Procedure Law and Rules [B 45]. This claim is erroneous because no such review exists pursuant to Article 78. Furthermore, what review might exist, could not protect the Union's federal rights under Section 13(c) of the Act or under the 13(c) Agreement.

In Matter of Lakeland Water District v. Onondaga County Water Authority, 24 N.Y.2d 400, 407 (1969), the New York State Court of Appeals advised that Article 78 proceedings cannot be used to review legislative action:

> An article 78 proceeding, it is settled, may not be utilized to review legislative action . . . and an order of an administrative agency fixing rates is deemed a legislative act . . . .

In Kaskel v. Impellitteri, 306 N.Y. 73, 80 (1953), the Court explained that if a court displaced an administrative-legislative act, it would be usurping legislative power that had been delegated to the administrative body. The Court stated:

> [H]ere we have a naked question of legality, that is, of power, and the particular power to make a determination on this matter of judgment has been conferred by statute on these defendants. . . . However, the situation here actually displayed is one of those as to which the Legislature has authorized the city officials, including elected officials, to make a determination, and so the making thereof is simply an act of government, that is, an exercise of governmental power, legislative in fundamental character, which, whether wise or unwise, cannot be overhauled by the courts. If there were to be a trial here and the courts below should decide in favor of plaintiff, there would be effected a transfer of power from the appropriate public officials to the courts. The question is simply not a justiciable one. [Emphasis added].

This is particularly probative herein. Section 209(e)(e)(iv) of the Civil Service Law vests power in the Authority, not in any court, to impose a resolution on the Union, on terms "it deems to be in the public interest."* Since the imposition of a resolution by the Authority is a legislative act [See, Appellant's Brief, at pg. 19, and cases cited], such resolution is not subject to court review.

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* The Authority is also vested with the power, which it exercised herein, to enter into agreements with the Union [Public Authorities Law §1331(14)], including interest arbitration agreements [Civil Service Law §209(3)(d)(ii)].

It is noted, however, that even if court review were authorized, such review could not protect the Union's federal rights under Section 13(c) of the Act or under the 13(c) Agreement. Such review could only concern: whether the Authority complied with the statutory standards set forth in Civil Service Law §209(3)(e); whether the Authority exceeded its grant of authority; and/or, whether the Authority violated due process of law. [Matter of Lakeland Water District v. Onondaga County Water Authority, supra, 24 N.Y.2d 400, 408 (1969)].

Thus, excluded from review would be questions concerning the Authority's violation of the Union's federal rights under Section 13(c) of the Act or under the 13(c) Agreement. Since there exists no state judicial review that can protect the Union's federal rights herein, Burford abstention would be inappropriate.*

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* For this reason, it is noted that the Authority's reliance on "Our Federalism" as grounds for "abstention" [B 50], is similarly misplaced. "Our Federalism" relies upon: "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." Gibson v. Berryhill, 411 U.S. 564, 577 (1973). Since there exists no such available state tribunal here, "abstention" under the doctrine of "Our Federalism" is inapplicable.

Additionally, it is noted that this is not a case where state criminal judicial proceedings are to be enjoined, as in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971), nor is it a case where state civil proceedings are to be enjoined, as in Huffman v. Pursue Ltd., 420 U.S. 592, 95 S.Ct. 1200 (1975). Nor is it an effort to enjoin allegedly persistent illegal conduct of the executive branch of a state government, and to thus inject the federal judiciary into the operations of the state government, as in Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598 (1976). Simply put, "Our Federalism" has nothing to do with this case.

Finally, it is submitted that the enforcement of the comprehensive federal plan for the improvement of mass transit and the protection of employee rights expressed in the Act cannot be left to the courts of the various states. Such a result might well defeat the beneficial purposes of this federal plan. As the Supreme Court observed in Machinists v. Central Airlines, 372 U.S. 682, 690 (1963):

> If these contracts are to serve this function under §204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme.

Thus, this case is clearly one where abstention would be improper.

C. Thibodaux Abstention Would Not Be Appropriate Herein

Thibodaux abstention is based on the premise that the federal courts should leave unsettled state law to the state courts for decision. [Louisiana Power & Light Co. v. City of Thibodaux, supra]. In the instant case there exists no unsettled state law. [See, Appellant's Brief, at pgs. 45-51]. Thus, Thibodaux abstention is also inappropriate herein.

It is noted in this regard that the Authority's reliance on Staten Island Rapid Transit Operating Authority v. International Brotherhood of Electrical Workers, Local 922, supra, Civil No. ____ (E.D.N.Y. February 4, 1977) is misplaced. [B 47-48]. That

case concerned whether certain public employees, engaged in the operation of a railroad allegedly under the Railway Labor Act, possessed the right to strike. That question, as the District Court made clear, is very complex and involves unsettled questions of New York State Law, unlike the case at bar.

Furthermore, that case is not an abstention case. It found its way to the District Court because the defendants had removed the action from state court. The District Court, therefore, did not abstain; rather, it remanded the case back to the state courts.

This distinction was not ignored by the court. Had the case been commenced in District Court, the court would have addressed the merits. The court stated:

> Were the matter to come before the Court as an action commenced in this court by the Staten Island Transit Operating Authority to obtain an injunction under the Railway Labor Act, this Court would follow the decision of Judge Dooling of July 8, 1974, and it would deny an order restraining the use of the strike procedures by the defendant, the International Brotherhood of Electrical Workers, Local 922; however, this matter does not come before this Court, and it becomes hearby [sic] reason for removal not being commenced in this Court.

It is submitted, therefore, that Thibodaux Abstention is also inappropriate herein. Thus, no error was committed by the District Court's failure to abstain in this action.

CONCLUSION

For all the foregoing reasons and authorities, and all of the reasons and authorities set forth in Appellant's Brief, it is respectfully submitted that the order of the District Court, denying the Union's motion for a preliminary injunction, must be reversed and that:

1. A preliminary injunction must issue herein enjoining factfinding and enjoining the Authority from imposing upon the Union a resolution of the dispute; and

2. Judgment must issue ordering the entire dispute to arbitration.

Respectfully submitted,

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